Sambo's Restaurants, Inc. *and* **James T. Foley.** Case 9-CA-15554

February 19, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On July 30, 1981, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Sambo's Restaurants, Inc., Florence, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge inadvertently failed to conform the notice to the recommended Order; we shall modify the notice accordingly.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT withhold overtime work from or otherwise discriminate against employees in regard to their hire or tenure of employment, or any term or condition of employment, because of their union or protected concerted activities.

WE WILL NOT threaten employees with reprisals because of their union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, as amended, except to the extent that such rights may be affected by lawful agreements in accordance with Section 8(a)(3) of the Act.

WE WILL make Timothy Hammonds and Willard Ealey whole for any loss of pay suffered by reason of the discrimination against them, with interest.

SAMBO'S RESTAURANTS, INC.

DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was heard pursuant to due notice on May 4 and 5, 1981, at Cincinnati, Ohio.

The original charge was filed on July 9, 1980. The amended charge was filed on August 25, 1980. The complaint in this matter was issued on August 26, 1980. The issues concern whether the Respondent (1) violated Section 8(a)(1) of the Act by threatening an employee with reprisals if he engaged in protected concerted activities, and (2) discriminated against employees in violation of Section 8(a)(3) and (1) of the Act by issuance of reprimands and withholding of overtime because such employees engaged in protected concerted activities.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel and the Respondent and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER[1]

At all times material herein, Sambo's Restaurants, Inc., the Respondent, a California corporation, has been engaged in the preparation, warehousing, and distribution of restaurant food products at and from its Florence, Kentucky, facility.

During a representative 12-month period, the Respondent, in the course and conduct of its business operations described above, purchased and received products, goods, and materials valued in excess of $50,000, which were shipped to its Florence, Kentucky, facility directly from points outside the State of Kentucky.

As conceded by the Respondent and, based on the foregoing, it is concluded and found that the Respondent is, and has been at all times material herein, an employer

[1] The facts herein are based on the pleadings and admissions therein.

engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED[2]

Truck Drivers, Chauffeurs, and Helpers Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Preliminary Issues; Supervisory-Agency Status*

The General Counsel alleges and the Respondent admits that Jerry Crook, warehouse supervisor, and Kurt Schultz, shift supervisor, were supervisors of the Respondent within the meaning of Section 2(11) of the Act. The General Counsel alleges and the Respondent denies that Crook and Schultz were agents of the Respondent within the meaning of Section 2(13) of the Act. Normally, supervisory status reveals agency status for most aspects of representative actions. The type of conduct of Crook and Schultz involved in this case is the type for which supervisory status connotes agency status. Accordingly, it is concluded and found that:[3]

At all times material herein, the following persons occupied the positions set opposite their respective names, and are now, and have been, supervisors of the Respondent within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act: Jerry Crook—warehouse supervisor; and Kurt Schultz—shift supervisor.

B. *Threat of Reprisal; Elimination of Overtime; and Reprimands*

1. Issues

The issues in this case concern whether the Respondent (a) threatened employees with reprisals (elimination of overtime) if an employee filed a grievance concerning the assignment of certain overtime, (b) eliminated the assignment of certain overtime because an employee indicated that he was going to file a grievance concerning the assignment of certain overtime, and (c) issued reprimands to certain employees because they filed grievances.

2. Background

The Respondent and Truck Drivers, Chauffeurs and Helpers Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, have had a collective-bargaining relationship for a number of years concerning a bargaining unit composed of all warehouse employees employed by the Respondent at its warehouse located in Florence, Kentucky, including, but not limited to, employees performing the work of warehousemen. The issues in this case concern the Respondent's conduct and the employees in such bargaining unit.

The critical events in this proceeding occurred in March and April 1980. The collective-bargaining contract in existence during the critical events was the contract between the Union and the Respondent effective from April 1, 1979, to March 31, 1982.

With respect to the issues in this case the following provisions of such collective-bargaining agreement are noted:

> ARTICLE 26. GRIEVANCE PROCEDURE.
>
> (a) A grievance is hereby defined to be any controversy, complaint, misunderstanding or dispute involving the interpretation, application or violation of any of the provisions of this agreement.
>
> (b) A grievance must be filed in writing within ten (10) working days after it occurs or with reasonable diligence the employee, the Union or the Company should have determined that the grievance occurred. Any employee on layoff will have ten (10) working days after his return to work, or within ten (10) working days after the employee finds that he was aggrieved.
>
> (c) The Union and the Company agree that all grievances shall be resolved as follows:
>
> Step 1. The aggrieved employee or employees shall first take the matter up with the inmediate Company supervisor, with the steward present.
>
> Step 2. If no settlement is reached within one (1) working day in Step 1, the steward and the responsible supervisor or his designated representative shall promptly discuss the matter.
>
> Step 3. If no settlement is reached within two (2) working days in Step 2, or the grievance is a Company or Union grievance, representatives of the Union and the Company will discuss the matter.
>
> If no agreement can be reached under the procedure outlined above, the Company or the Union may submit the grievance to a mutually suitable arbitrator.

(Note: There are other provisions to this article which have no bearing on the issues in this proceeding.)

> ARTICLE 7. SENIORITY.
>
> (a) Seniority, as defined and provided for within this article, shall apply only to full time regular employees who have completed the probationary period set forth in Article 6 above. Seniority is continuous employment in the bargaining unit from the employee's last date of transfer into the bargaining unit or last date of hire in the bargaining unit.
>
> (b) Seniority shall govern all layoffs and recalls.
>
> (c) A leadman is a member of the bargaining unit whose duties include conveying management's written work instructions to employees on a shift. The

[2] The facts are based on the pleadings and admissions therein.

[3] *The Rupp Forge*, 201 NLRB 393, 394 (1973).

leadman does not have the power to hire, fire or discipline employees. The leadman serves at the discretion of management; it is not a promotion; assignment to or demotion of shall be at management's discretion.

(d) The leadman shall receive twenty-five cents (25¢) per hour additional in wages for services rendered.

(Note: There are other provisions to this article which have no bearing on the issues in this proceeding.)

ARTICLE 14. OVERTIME.

* * * *

(j) Overtime during normal work week by shift seniority only. Overtime on Sunday shall be by board seniority only.

(Note: There are other provisions to this article which have no bearing on the issues in this proceeding unless referred to elsewhere herein.)

ARTICLE 23. STEWARDS.

(a) The Union may select a steward from among the regular employees of the Company working in such Company's warehouse. The sole function of the steward shall be to see that the terms of this agreement are fulfilled both by the Company and the employees.

(b) The name of the steward shall be certified in writing by the Union to the Company within seven (7) days of the signing of this agreement or of the changing of stewards.

(c) The Company recognizes the authority of the job steward to handle such Union business as may from time to time be delegated to him by the Union, such business to be conducted during normal working hours. The job steward has no authority to take strike action or any other action interrupting the Company business in violation of this agreement, except as authorized by official action of the Union. The Company recognizes the limitations upon the authority of the job steward and in so recognizing such limitation shall have the authority to impose proper discipline including discharge without recourse, on the job steward in the event he has taken unauthorized strike action, slowdown, or work stoppage in violation of this agreement. The job steward shall not actively solicit the filing of grievances. The job steward shall handle Union business expeditiously. The job steward shall notify management when he is doing Union business.

Despite the foregoing referred-to contractual provisions relating to "leadmen" and to the assignment of overtime on the basis of seniority, the Respondent instituted a practice in assigning "leadmen" preshift overtime in 1976. Most, if not all, leadmen were the most senior employees on their respective shifts. Assignment of overtime to a leadman who was the most senior employee on his shift was not an act violative of the collective-bargaining agreement. It appears that the Respondent's assignment of preshift overtime from 1976 to March 1980 was to leadmen who were the most senior employees or to leadmen in instances where a more senior employee was not interested in receiving such overtime. It appears that the Respondent was aware of its contractual restrictions on the assignment of overtime and attempted to tailor its overtime assignments so as to conform with its contractual obligations and with its desire to assign overtime to leadmen.

Sometime before April 3, 1981, as an example, Dave Mullins was the leadman on a shift which commenced work at 6:30 a.m. Elmo Browning was the employee with the most seniority on such shift. Browning let the Respondent know that he did not want the preshift overtime if it were limited in time from 6 to 6:30 a.m. However, Browning complained about overtime assignments to Mullins if the starting time for such overtime was to be before 6 a.m. The reason for Browning's desiring overtime commencing before 6 a.m. was that there was a 25-cent-an-hour night-shift differential. A grievance by Browning as to such overtime (pre-6 a.m.) was settled.

On March 3, 1980, there occurred a shift change. Timothy Hammonds became the most senior employee on the second shift. Willard Ealey, second in seniority to Hammonds, became the leadman of the second shift. Prior to the change, Respondent revealed its awareness of its problem in assigning overtime to leadmen. Thus, Warehouse Supervisor Crook told Ealey that Hammonds had not been picked as leadman because Hammonds was already union steward and Crook did not want Hammonds to try to hold down both jobs. Crook told Ealey that the only problem about Ealey's being leadman was that Hammonds was the senior man and would have to be asked about overtime first.

During the week March 3 to 7, 1980, the Respondent on March 3, 4, 5, and 6, 1980, offered Hammonds opportunity at preshift overtime on March 4, 5, 6, and 7, 1980. Hammonds declined the offer of preshift overtime work on March 4, 6, and 7, but accepted and worked preshift overtime on March 5, 1980. Leadman Ealey worked preshift overtime on March 4, 5, 6, and 7, 1980.

The Respondent, by Schultz, on March 7, 1980, offered *Ealey* opportunity to work preshift overtime on Monday, March 10, 1980. Schultz did not offer *Hammonds* opportunity to work preshift overtime on March 10, 1980.[4]

On March 10 and 11, 1980, the Respondent did not offer either Ealey or Hammonds opportunity to work preshift overtime. And there was no preshift overtime worked by Ealey or Hammonds on March 11 and 12,

[4] I discredit Schultz' testimony inconsistent with the facts found. Schultz' testimony was to the effect that on March 7, 1980, he told Hammonds and Ealey to handle the question of the preshift overtime between themselves. I find Ealey's testimony the most convincing and credit that he was asked by Schultz to work preshift overtime on March 10, 1980. Considering this and the logical consistency of all of the facts, I find the facts as set out. However, a crediting of Schultz' version of facts clearly reveals a "threat of reprisal" if Hammonds filed a grievance, and the overall facts clearly reveal a withholding of the preshift overtime on the second shift because of the expected filing of a grievance thereto.

1980. Schultz heard that Hammonds was upset about the failure of the Respondent to offer him the preshift overtime worked by Ealey on March 10, 1980. Shift Supervisor Schultz on March 12, 1980, discussed the leadman's overtime problem with Warehouse Supervisor Crook. Schultz and Crook decided on a solution to the problem. Such solution involved offering each man one-half an hour of preshift overtime on a daily basis.

Thereafter, on March 12, 1980, Schultz spoke to Hammonds and Ealey about the preshift overtime problem. Schultz told Hammonds and Ealey that he could not give them both an hour of overtime each day but that he could give each of them half an hour of preshift overtime each day. Hammonds and Ealey agreed with Schultz to this handling of preshift overtime. Both Ealey and Hammonds worked one-half hour of preshift overtime on March 13, 1980.

3. The threat of reprisal

On March 13, 1980, Hammonds told Schultz in effect that he intended to file a grievance concerning the preshift overtime assignment of work to Ealey on March 10, 1980. Schultz understood from what he heard that Hammonds was filing a general grievance on the issue[5] of assignment of overtime work. Schultz left from where he and Hammonds were talking and returned later. Schultz told Hammonds that if he filed the grievance, that the Respondent did not need the overtime work, and that it would not only cut out his overtime work but would cut out Ealey's overtime work.

Conclusions

It is clear that Hammonds' right to file grievances concerning adherence to contractual provisions was and is a right protected by Section 7 and Section 8(a)(1) of the Act. The Respondent's threat, by Schultz, that Hammonds and Ealey would lose opportunity at preshift overtime if Hammonds filed the referred-to grievance, clearly constitutes conduct violative of Section 8(a)(1) of the Act. It is so concluded and found.

4. Elimination of preshift overtime for Ealey and Hammonds

The facts are clear that after the above "referred" to events of March 13, 1980, preshift overtime was not offered to Ealey or Hammonds during the time that they worked on the second shift during the period ending 6 months after March 3, 1980.

In addition to the background evidence relating to preshift overtime, some evidence was adduced to indicate that at a later "bid" period, a leadman (who was the most senior employee on the shift) worked some preshift overtime. Some evidence was adduced to the effect that, when Schultz was employed as a supervisor on the second shift, he was not experienced and that a need existed for usage of preshift overtime by an experienced employee, that such need existed later during another bid period for a brief period of time, and that the Respondent eliminated preshift overtime on the second shift for economic reasons.

Conclusions

Considering the overall facts which reveal that the Respondent continued its usage of preshift overtime on other shifts, the timing of events, and the logical consistency of all of the facts, I am persuaded that the Respondent was not economically motivated by its reduction of preshift overtime on the second shift.[6] Rather, it is clear that the Respondent was motivated in the elimination of preshift overtime on the second shift because Hammonds had stated that he intended to file a grievance about the assignment of overtime. It is clear that the elimination of a benefit of employment from employees because of employee exercise of Section 7 rights in connection with the enforcement of contractual terms constitutes conduct violative of Section 8(a)(3) and (1) of the Act. It is so concluded and found.

In making the foregoing findings and conclusions, I have considered the fact that the Respondent's real intent in usage of preshift overtime was to have overtime for its leadmen. The Respondent, in such regard, excepting for the critical issues in this case, has attempted to reconcile its desires with its contractual rights and obligations. Considering the evidence relating to such accommodations, there is no evidence to support a finding that similar accommodations could not have been continued with respect to assignment of preshift overtime to the second shift. Rather, Schultz' statements to Ealey and Hammonds on March 12, 1980, reveal that the Respondent intended to give one-half hour preshift overtime daily to both Ealey and Hammonds for the remainder of the 6-month period which had commenced on March 3, 1980.[7] Under such circumstances, it is clear that the Respondent's action in cancellation of preshift overtime for the second shift, because of Hammonds' expressed desire to file a grievance about overtime, eliminated the opportunity that Ealey and Hammonds had for such referred-to overtime.[8] In sum, it is clear that the Respondent's removal of preshift overtime opportunity in March 1980, from the second shift and from Ealey and Hammonds, constitutes conduct violative of Section 8(a)(3) and (1) of the Act.

[5] As is often the case, parties do not clearly articulate what they really mean. I am persuaded that Hammonds intended to communicate concerning a grievance on the one-hour preshift overtime worked by Ealey on March 10, 1980. I am also convinced that Schultz thought that Hammonds was complaining in general. However, under any version of facts arising from the testimony of the witnesses, the ultimate findings would remain the same.

[6] The Respondent's brief correctly summarizes the composite effect of Schultz' and Kasprowicz' testimony to the effect that Kasprowicz advised Crook that, since leadman overtime was unnecessary, it should be eliminated if the employees in question could not agree on splitting the overtime. Thus, the elimination of preshift overtime was not economically motivated but because a grievance might be filed.

[7] The Respondent's practice was to have shift changes every 6 months.

[8] Consideration has been given to the Respondent's entanglement in attempting to give "leadmen" overtime when, in fact, according to the contract, overtime had to be awarded by seniority. Under the circumstances, there is no reason to believe that, absent the filing of a grievance, the Respondent would have eliminated such overtime. This being so, the remedying of the coercive retaliatory effect of the removal of overtime requires that Ealey and Hammonds be made whole for the loss of preshift overtime. The question presented here is not contract compliance but the protection of the right to file grievances under the Act.

There is great dispute as to the events of March 26, 1980. Thus, it is disputed as to whether Hammonds and Foley handed a grievance (filed by Foley) to Supervisor Schultz and whether Schultz became angry and threw the grievance down. There is also dispute as to whether Hammonds and Foley diligently worked between 11 p.m. and midnight, or in effect talked and stood around and did not work.

Much evidence was offered or proffered and rejected concerning the credibility of the General Counsel's witnesses. Whether accepted or rejected as evidence, in whole or in any percentage thereof, my credibility resolutions as to the testimony of the events of March 26, 1980, would remain the same.[9]

I found Schultz to appear to be a more frank, forthright, and truthful witness than all of the other witnesses to the event.[10] I base this on demeanor observation and on the logical consistency of all of the facts and the following observations. Hammonds', Foley's, and Biers' testimony relating to the handing of the grievance to Schultz and to Schultz' throwing the same on the floor or toward a desk appeared contrived. I note that the grievance allegedly filed by Foley and dated March 26, 1980, indicates that the grievance had been discussed with the employer on March 26, 1980. The testimony of such witnesses, however, was to the effect that Ealey, Hammonds, and Foley had only discussed such grievance among themselves, had argued as to whether the event complained of occurred on March 12 or 13, 1980, and as to whether the grievance had to be filed in order to be timely. The overall evidence persuades that there had been no discussion with the employer about the grievance on March 26, 1980, prior to the alleged "handing" of the grievance to Schultz. I note further that Hammonds' testimony as to when he "handed" the grievance to Schultz was contradictory. Thus, Hammonds at one point testified that toward the end of his break (10:30 p.m. to 10:45 p.m.) he took Foley's grievance to Supervisor Schultz. Later, Hammonds testified that he took the grievance to Schultz after the break was over. The General Counsel's witnesses also varied in their testimony as to whether Schultz merely or casually dropped the grievance on the floor or threw the grievance down. Considering all of the testimony, I am persuaded that Schultz' testimony in denial that Foley's grievance was presented to him is to be credited over the testimony otherwise. I am persuaded that Hammonds, Ealey, and Foley engaged in substantial discussion as to when complained of events occurred and when a grievance had to be filed to be timely and whether a grievance should be filed. Thus, I note that Hammonds as a steward and a key person involved in the grievance could have but did not file the grievance on his own.

I also credit Schultz' testimony over the General Counsel's witnesses as to whether Hammonds and Foley were working between 11 p.m. and midnight, or standing around and talking. Thus, I credit Schultz' testimony and the evidence as a whole as a basis for the following findings.[11] Between 11 p.m. and midnight, Schultz observed that Foley and Hammonds did not appear to be working but were standing around and talking. On several occasions Schultz told Hammonds and Foley to return to work. Hammonds on such occasions told Schultz that he was on union business and that, as long as he was on union business, he could stand there and talk about such business. Schultz at one point in the discussion told Hammonds that he did not have the right to stop work to discuss union business without getting permission from his supervisor.

At some point in the discussion Foley suggested to Hammonds that they should get to work or Schultz would charge them with "stealing time." Schultz indicated that this was correct.

Around midnight, warehouseman Scroggins had commented to Schultz about the fact that Hammonds and Foley did little work that night.

On March 27, 1980, Crook discussed with Director of Labor Relations Crowley the events of March 26, 1980, concerning Foley and Hammonds and told Crowley that Scroggins had told him about the incident. Crowley told Crook to verify the events by talking to Schultz.

On March 27, 1980, Supervisor Schultz told Warehouse Manager Crook about the problem with Hammonds and Foley. Crook related in effect that Scroggins had already told him about the problem. Crook later advised Crowley of Schultz' conversation as to the March 26, 1980, events. Crowley then drafted letters which were reviewed and signed by Schultz. Such letters were then transmitted to the Union and to Foley and Hammonds.[12]

The letters were as follows:

[9] I would note that an Administrative Law Judge discredited the testimony of Foley and credited the testimony of Crowley as to certain issues in a prior case involving the Respondent. Considering the facts and basis for crediting of witnesses in that prior case and the facts, testimony, and demeanor of the witnesses in this case, I find no persuasive value in the evidence presented as regards the decision in *Sambo's Restaurants, Inc.*, 9-CA-14791. With respect to the evidence to the effect that Biers had been convicted of second degree robbery, I note that the Respondent did not perfect such evidence to reveal whether the conviction related to an offense punishable by imprisonment in excess of 1 year under the law under which the individual is convicted. Despite this, it must be stated that the trier of facts in unfair labor practice proceedings has discretion to receive and consider evidence, insofar as is practicable, in accordance with the Rules of Evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States. Further, such rules of evidence are to be construed so as to secure fairness in administration and to the end that truth may be determined. The evidence relating to Biers' conviction was not objected to. Such evidence of conviction for an aspect of robbery, similar to theft, tends to reveal untrustworthiness of an individual. In the instant case, however, in view of all of the other facts, I find that such evidence does not help in determining the credibility of the witness involved. I would note that there was some proffer of evidence and exhibits relating to truthfulness of statements made on job application forms. Such proffers were rejected. Basically, receipt or rejection of such evidence is discretionary. Since such type of evidence tends to confuse the issues and to create a possibility of burdening the record, I adhere to my ruling of rejection of such evidence.

[10] Schultz' testimony as regards his remarks to Hammonds and Ealey on March 13, 1980, is indicative of an honest witness.

[11] The facts are based on a composite of the credited testimony of all witnesses unless otherwise indicated.

[12] Hammonds apparently did not accept the letter as mailed to him. It is apparent that he became aware of such letter however.

April 3, 1980
Certified #9728660
Mr. James Foley
4034 Charwood Cir. Apt. G4
Erlanger, Kentucky 41018
Dear Jim:

On Wednesday evening March 26, 1980, at approximately 11:00 p.m. you stopped working at your assigned job helping the loader and checker to presumably discuss union business with other employees, including the steward, Tim Hammonds. No freight was loaded or checked between 11:00 p.m. and 12:00 a.m. while this discussion continued.

Your refusal to work for this period of time constitutes a violation of Article 25 paragraph B of the Warehouse Employees Agreement, theft of time.

This is a warning letter. Should you be involved in a related and/or similar incident you will be further disciplined in accordance with the existing contract.

Respectfully,
Kurt Schultz
Supervisor
KS:js
cc: Chris Bishop,
Jerry Kiser—Certified #9728661
Jerry Crook
Mike Crowley
Gary Kasprowicz
File

April 3, 1980
Certified #9728659
Mr. Tim Hammonds
8873 Princeton-Glendale
Lat. 38A
Hamilton, Ohio 45011
Dear Tim:

Under the provisions of Article 23, paragraph C, in the Warehouse Employees Agreement you are hereby officially in violation of said agreement.

On Wednesday evening March 26, 1980, at approximately 11:00 p.m. you stopped working at your assignment as loader and checker to presumably discuss union business with other employees, without notifying your supervisor of such action. This was in effect a theft of time that involved at least one other employee, James Foley, who was assigned to help you load and check. There was no freight loaded or checked between 11:00 p.m. and 12:00 a.m.

This is a warning letter. Should you be involved in a related and/or similar incident you will be further disciplined in accordance with the existing contract.

Respectfully,
Kurt Schultz
Supervisor
Ks:js
cc: Chris Bishop,
Jerry Kiser—Certified #9728661
Jerry Crook
Mike Crowley
Gary Kasprowicz
File

Conclusions

The General Counsel contends that the letters of reprimand to Hammonds and Foley were given because of Hammonds' conduct in filing grievances. The Respondent contends that the reprimands were given for cause and that its motivation was not because Hammonds or Foley were involved in the filing of grievances.

The ultimate issue is what was the Respondent's motivation in the issuance of reprimands to Foley and Hammonds. Considering the credited facts which reveal that (1) Schultz had a basis to believe that Foley and Hammonds were standing, talking to each other and not working, and (2) Hammonds and Foley were standing, talking, and not diligently working, I am persuaded that the facts do not establish a *prima facie* case that the letters of reprimand were given in violation of Section 8(a)(1) and (3) of the Act.[13] It is so concluded and found.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that the Respondent withheld opportunity for overtime work for Timothy Hammonds and Willard Ealey, in violation of Section 8(a)(3) and (1) of the Act, the recommended Order will provide that the Respondent make each whole for loss of earnings within the meaning and in accord with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977), except as specifically modified by the wording of such recommended Order.[14]

[13] The General Counsel argues that this is a pretext case, that the facts simply reveal that the Respondent issued letters of reprimand to Hammonds and Foley because of their union or protected concerted activity but on the pretext that the employees were not working. This case simply involves credibility and factual issues. The facts as found reveal that the letters of reprimand were not on a pretextual basis. Nor do the facts establish a *prima facie* case of mixed motivation issues contemplated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[14] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Sambo's Restaurants, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Truck Drivers, Chauffeurs, and Helpers Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By withholding of certain overtime work because an employee indicated that he would file a grievance concerning the assignment of overtime work and in the context of statements by the Respondent's agents that such overtime work assignments would be withheld if grievances were to be filed, the Respondent engaged in acts and conduct which tend to discourage union activity, including the filing of grievances under the collective-bargaining agreement, in violation of Section 8(a)(3) and (1) of the Act.

4. By the foregoing and by interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[15]

The Respondent, Sambo's Restaurants, Inc., Florence, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withholding overtime work from or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment because of their union or protected concerted activities.

(b) Threatening employees with reprisals because of their union activities or protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Make Timothy Hammonds and Willard Ealey whole for any loss of pay suffered by reason of the discrimination against each in the manner described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at Respondent's place of business at Florence, Kentucky, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of unlawful conduct not specifically found to be violative herein be dismissed.

[15] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[16] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."